UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of COLLEGE FOOTBALL ASSOCIATION, an unincorporated association, and CAPITAL CITIES/ABC, INC., a corporation.	DOCKET NO. 9242

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

RESPONDENTS

PARAGRAPH ONE: Respondent College Football Association ("CFA") is an unincorporated association with its principal place of business at 6668 Gunpark Drive, Boulder, Colorado 80301-3339.

PARAGRAPH TWO: CFA is an organization whose members include many of the nation's major college-football-playing institutions, and which, among other things, negotiates and administers the sale of certain college football television rights for its participating members.

PARAGRAPH THREE: For the year ending December 31, 1989, CFA generated revenue of approximately $33.75 million from the sale of college football telecast rights.

PARAGRAPH FOUR: Respondent Capital Cities/ABC, Inc. ("Capital Cities") is a corporation organized and existing under the laws of the State of New York with its principal executive offices at 77 West 66th Street, New York, New York 10023.

PARAGRAPH FIVE: Capital Cities is principally engaged in television and radio broadcasting. ABC Television Network, one of the three major over-the-air television networks, is wholly owned by Capital Cities, which also owns 80% of ESPN, a cable sports programming service.

PARAGRAPH SIX: For the year ending December 31, 1989, Capital Cities had net revenue of $4.96 billion.

JURISDICTION

PARAGRAPH SEVEN: Each of the respondents maintains, and has maintained, a substantial course of business, including the acts or practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

ANTICOMPETITIVE ACTS OR PRACTICES

PARAGRAPH EIGHT: Respondent College Football Association, through agreement with and among its members pursuant to which its members have agreed not to compete with each other and the association, has entered into telecast rights agreements with telecasters that restrict competition in the marketing of college football telecasts.

PARAGRAPH NINE: Respondent CFA and respondent Capital Cities (or entities owned or controlled by Capital Cities) have entered agreements which give Capital Cities exclusive telecast rights to certain college football games and which otherwise restrict competition in the marketing of college football telecasts.

ANTICOMPETITIVE EFFECTS

PARAGRAPH TEN: By engaging in the acts or practices described in paragraphs eight and nine of this complaint, respondents have unreasonably restrained competition in the following ways, among others:

(a) Competition among schools in the marketing of college football telecasts has been hindered, restrained, foreclosed and frustrated;

(b) Competition among telecasters of college football games has been hindered, restrained, foreclosed and frustrated; and

(c) Consumers have been deprived of the selection of college football games that would have otherwise been televised in a competitive environment.

PARAGRAPH ELEVEN: The acts or practices of respondents described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

NOTICE

Notice is hereby given to the respondents hereinbefore named that the 13 day of November, 1990, at 10 a.m. o'clock is hereby fixed as the time and the Federal Trade Commission Offices, 6th and Pennsylvania Avenue, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents have violated Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Rescinding in all respects all agreements which eliminate or restrict competition between and among respondent CFA's members in the sale of college football telecast rights.

2. Rescinding in all respects all agreements between respondent CFA and respondent Capital Cities/ABC, Inc. or other telecasters which eliminate or restrict competition among respondent CFA's members in the sale of college football telecast rights.

3. Prohibiting the respondents in the future from entering into or maintaining any agreement which eliminates or restricts competition between and among respondent CFA's members in the sale of college football telecast rights.

4. Requiring the respondents to file compliance reports with the Commission and to give prior notice of any changes in form or organization which would affect compliance obligations under the order entered for a period of ten (10) years.

5. Publication of the order to respondent CFA's members and other interested parties.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 5th day of Sept A.D., 1990, issues its complaint against said respondents.

By the Commission, Commissioner Azcuenaga dissenting.*

Donald S. Clark
Secretary

SEAL:
ISSUED:

* Commissioner Owen concurs in the issuance of the complaint, except to the extent that it alleges that contractual provisions governing the minimum and maximum number of appearances of a particular member school or conference violate section 5 of the Federal Trade Commission Act.

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and	)	**Docket No. 9242**
	)	
CAPITAL CITIES/ABC, INC., a corporation.	)	

NONBINDING STATEMENT OF
COLLEGE FOOTBALL ASSOCIATION

The College Football Association ("CFA") hereby submits its Nonbinding Statement pursuant to Commission Rule 3.21(a).

I. FTC'S LACK OF JURISDICTION OVER THE CFA

As the CFA has asserted in its pending Motion to Dismiss, the Federal Trade Commission ("the Commission") lacks jurisdiciton over the CFA. The CFA is not organized to carry on business for its own profit or that of its members and is not, therefore, a corporation with the meaning of Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(2). The Commission's jurisdiction to act is a cardinal and dispositive issue which can and should be resolved at the outset, before all parties expend significant resources discovering and trying a matter that the Commission has no authority to hear.

Complaint Counsel acknowledges that the evidence will show that the CFA is a nonprofit association, *Complaint*

Counsel's Nonbinding Statement, p. 5. *(Complaint Statement)*.[1/] Complaint Counsel relies upon the Commission's decision in *American Medical Association*[2/] as authority that the Commission can assert jurisdiction over a nonprofit organization whose activities engender "a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *Id.* at 983. However, the "pecuniary benefit" identified in *AMA* was unambiguously a benefit to the commercial, profit-making activities of the AMA membership. 94 FTC at 983. It has long been settled, since *Community Blood Bank*,[3/] that pecuniary benefits to *non-profit* members do not constitute the kind of "profit" required under Section 5(a)(2). *See AMA*, 94 FTC at 989, (distinguishing the profit-making members of the associations in *AMA* from the substantially non-profit membership of an association in *Community Blood Bank*).

1/ Complaint Counsel states that the evidence will show that the CFA is "*nominally* a nonprofit association". (Emphasis supplied.) There is no indication of what is being suggested. The CFA's nonprofit status has never been questioned and certainly is not in name only, as the documents attached to CFA's motion to dismiss show.

2/ 94 FTC 701 (1979), *aff'd sub nom, American Medical Association v. Federal Trade Commission*, 638 F.2d 433 (2d Cir. 1980), *aff'd mem. by an equally divided court*, 455 U.S. 676, 71 L.Ed.2d 546 (1982).

3/ *Community Blood Bank of Kansas City Area, Inc. v Federal Trade Comm'n*, 405 F.2d 1011 (8th Cir. 1969).

The applicability of Section 5(a)(2) is not determined by whether the members of the association are "persons" under the antitrust laws, as Complaint Counsel indirectly argues. Id. p. 6. The members of Kansas City Area Hospital Association in Community Blood Bank included many "persons," including "instrumentalities of the federal, state, county or local governments," as well as nonprofit and proprietary corporations. Id. 405 F.2d at 1020 n.16. Rather, the inquiry under Section 5(a)(2) is whether the association "is organized to carry on business for its own profit or that of its members." As explained in CFA's Motion, its members, some of whom are private corporations and some of whom are government instrumentalities, are all tax exempt, nonprofit organizations.

The issue is not whether the antitrust laws would otherwise apply to the members of the CFA. The issue is whether the CFA conducts business for profit for itself or its members. The statute is not ambiguous, and neither is the case law. The Commission lacks jurisdiction over the CFA.

II. STATEMENT OF FACTS

A. Background

CFA was founded in 1977 to promote the common interests of colleges and universities that maintain and share a commitment to intercollegiate football at the

highest competitive level. The CFA is a voluntary association of 66 state and private colleges and universities, all of which play football in the National Collegiate Athletic Association's (NCAA) Division I-A.[4/] From its inception, the CFA has engaged in a wide range of activities designed to improve college football for the benefit of the institutions which support it and the athletes who participate in it.[5/]

Following the Supreme Court's decision in *NCAA v. Board Of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), declaring the NCAA's television plan unlawful under Section 1 of the Sherman Act, the CFA entered into the first of a series of television contracts which were designed to comply with the *NCAA* decision. In the Summer of 1984, the CFA negotiated a one-year contract with ABC for a series of Saturday afternoon games and a one-year agreement with ESPN for a series of Saturday night games.

4/ Some 40 Division I-A schools, 88 Division I-AA schools, and numerous others in Divisions II and III that play intercollegiate football are not members of the CFA.

5/ Such activities have included, among others, efforts to improve the graduation rates of athletes, increase academic standards for eligibility, conduct recruiting seminars, conduct economic and other studies of benefit to the membership, and propose legislation within the NCAA.

Following the 1984 season, CFA negotiated and signed a contract with ABC for the 1985 and 1986 seasons, and a two-year contract with ESPN for a Saturday night prime time series. A number of CFA members, including the entire Atlantic Coast Conference (ACC), Miami, Army, and Navy, declined to participate in these contracts and sold games outside the plan. In 1986, the CFA agreed to a four-year contract with CBS covering the 1987 through 1990 seasons and a contract with ESPN for the same period. The ESPN contract was expanded from its prime time only slot to include a series of games late Saturday afternoons, thus increasing to approximately 44 the number of CFA package games appearing on television in a season.

In February 1990, the CFA reached an agreement with ABC for the 1991 through 1995 seasons. Earlier, the CFA entered into a new agreement with ESPN for the same period. This contract will feature a new series of Thursday night games. Notre Dame, a long-time CFA member, decided not to participate in the CFA plan and entered into its own contract with NBC for the period 1991-95.

B. The Structure of the CFA Contracts

The basic structure of the CFA contracts has been essentially the same since 1984. Those CFA members who choose to participate in the television plan consent to assign to the CFA a right of first selection to their games. The CFA then negotiates with various over-the-air

networks, cable networks and syndicators for the sale of packages of games consisting of the right of the telecaster to select an agreed number of games from the CFA inventory and to televise those games at agreed times. Generally, the agreements permit the telecaster to select one or two games each Saturday during the season, on relatively short notice, either 6 or 12 days. The rights to all games not selected by one of the CFA telecasters return to the individual schools. Each member school has the right to every one of its games not selected under the CFA agreements.

The CFA's over-the-air network package with ABC is exclusive as against the other national over-the-air broadcast networks. Both the network and cable packages provide the telecaster with limited exclusivity as to a defined time period in which that telecaster presents its games. The CFA contracts limit the number of times any one team may appear as part of the package, but a team may appear as often as it wants outside the CFA package. The CFA contracts require the telecaster to allocate appearances to some extent among various "constituent groups" within the CFA.

The CFA agrees with each contracting telecaster to a single, lump sum price for a package of games each year for an agreed number of years. The CFA subsequently determines what individual participating schools will

receive from its television revenues. In general, a percentage of all revenue goes into a pool from which is disbursed an equal amount to each school as payment for agreeing to participate in the plan. Those schools actually selected to appear on television receive an amount for that appearance which varies according to which telecaster carried the game and whether the game was televised nationally, semi-nationally or regionally.

C. The CFA Plan is SIgnificantly Different From the NCAA Plan

The CFA plans in effect since 1984 bear little resemblance to the NCAA television plan struck down by the Supreme Court.

- Unlike the CFA plan which is voluntary not only in theory but in practice, the NCAA plan was mandatory for all members; refusal to participate or attempts to televise outside the NCAA plan could draw harsh sanctions from the NCAA, including expulsion and the inability to play other NCAA schools.

- The NCAA plan controlled the entire inventory of all member schools to the point of holding all unused inventory off the market; the CFA plan returns all games not selected in the CFA plan to the member schools each of which has the right to sell the television rights to every one of its games not selected under the CFA plan.

- The NCAA intentionally limited the total number of televised games for the claimed objective of protecting live attendance at untelevised games; the CFA attempts to sell as many games as possible to its telecaster customers and to promote the sale and telecast of its members' games outside the CFA packages.

- Unlike the NCAA plan, the CFA contracts do not limit the total output of college football on television. In total, there were approximately 28 NCAA network television exposures in 1982 and a supplemental cable series of perhaps eight exposures on TBS. In 1989, there were 44 exposures and 45 games telecast under the CFA contracts on CBS and ESPN. ABC had an additional 16 exposures and 25 games under its contract with the Big Ten/Pac 10. In 1989, there were by some estimates close to 300 total games televised, many of which involved CFA members selling games outside the CFA package on at least three widely available cable channels other than ESPN, as parts of at least three regular syndications to network affiliates, and on independent stations and cable carriers, and local, pay-per-view and closed circuit telecasts. The number of CFA games will likely rise to about 57 with the new contracts beginning in 1991.

- The NCAA did not sell games to telecasters, but instead fixed the prices at which individual schools

could sell their games. The CFA negotiates the sale of its own packages of games at a single price for each package. Individual CFA schools or conferences negotiate for themselves the prices of games or packages they sell outside the CFA contracts.

In general, Complaint Counsel's Statement contains a number of factual inaccuracies which the CFA contends will be demonstrated by the evidence adduced at a hearing, if necessary.

III. ANTITRUST ANALYSIS OF CFA'S PLAN

A. The Basic CFA Television Plan Is Not Inherently Suspect.

There is no anticompetitive purpose or effect in the CFA's basic plan design, i.e., the sale to a telecaster, by a single seller at a single negotiated price, of the right to select a series of games on relatively short notice from an inventory of games aggregated by the seller from a number of individual schools. No school is required to participate in the television plan. The CFA's aggregation of a game inventory from its membership is completely voluntary. A school may remain a member of the CFA without participating in the television plan, as a number of schools have done over the years.

The fact that all CFA member games not selected by one of the CFA's telecast contractors automatically return to the individual schools means that those schools are free to sell all of their games in the marketplace. The CFA plan

thus does not keep any game of its members off television. The plan as such does not restrict the total output of the CFA's own membership, let alone of college football as a whole, and thus does not on its face appear to reduce output.

With respect to price, the CFA contracts represent the sale of single-package products much like the blanket licenses upheld by the Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). As in *Broadcast Music*, the rights packages offered by CFA each constitutes a product different from a mere collection of unrelated individual games. The CFA is a single seller selling its products and establishing one price for each product. There is nothing in the pricing of the CFA packages that makes them inherently suspect as a matter of law.

Complaint Counsel urges at page 10 that: "The CFA negotiates the rights fees for the games it markets, preventing price competition for such telecasts." The Supreme Court in *Board of Regents*, in responding to NCAA's "cooperative 'joint venture'" contention, 468 U.S. at 113, did not reject the contention because a joint selling agency would have been unlawful, but because NCAA was *not* acting as a joint selling agency:

> The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, is a matter left

> to the networks and the individual schools.

Id. The Commission in its amicus brief affirmatively argued that a genuine joint selling agency for college football television rights might be permitted:

> [NCAA] also describes itself as a joint selling agency for its member institutions who have agreed to transfer it the sole authority to negotiate the sale of their output, i.e., the right to broadcast the games in which they compete [citation omitted]. Generally, such joint selling agencies are not subject to per se condemnation; rather, at least a limited scrutiny of the effect of these restrictions is appropriate. *See, e.g., Broadcast Music, supra.* Indeed, while the Court of Appeals held the current "exclusive control" of television rights unlawful, it reserved decision on whether television "rights may be [otherwise] commonly regulated" [citation omitted].

Id., p. 14. A joint selling agency must obviously set the price for its product, and in fact the reason NCAA's joint selling agency argument was rejected is because it did *not* do so.

The CFA does not set the price at which its members sell their individual games, at any level of the marketplace. It has no influence whatever on the prices negotiated for CFA members' games through other regional packages or for games sold individually, whether locally or nationally. The games are negotiated and sold as the market dictates, and as the members see fit. CFA sets the price

for only the product it sells, as a joint marketing agent, which is not only allowed of a joint marketing agent but, as illustrated in Board of Regents, required to avoid antitrust objections.

B. The CFA Plan is Procompetitive Because It Creates a New Product Efficiently.

The CFA plan is procompetitive because in the language of Massachusetts Board, it is "creating a new product" - - enhancing competition by offering the market a product that would not otherwise exist and that is capable of generating, efficiently and with certainty, the larger audiences that telecasters and advertisers desire. The CFA offers a telecaster a large inventory of high quality football games. That large inventory, in turn, affords the telecaster and its advertisers the assurance that they will be able to secure enough attractive games to fill out a season-long series of games that will generate predictable ratings on the buyer's network. The larger the inventory of games, the greater the range of selection and the greater the possibility of obtaining that game each week that will generate satisfactory ratings.

More than the mere size of the inventory, the CFA plan offers the telecaster the ability to select its programming on relatively short notice, usually 12 days, sometimes only six. This allows the telecaster to select the

games it believes are in greatest demand as the season progresses. Without such ability to obtain certain selections on short notice, the networks would likely be forced to lock in particular games by contracting for them well in advance of the season. Such a system would quickly become more rigid and less attractive to the consumer, hence to advertisers and telecasters, than what the CFA presently offers the market.

The CFA plan is procompetitive in that it economizes on resources by reducing transaction costs and provides the buyer of the package with a much more efficient means of purchasing attractive games over an extended period based upon predictable average ratings, rather than by engaging in a high cost effort to purchase individual games based on estimates of individual game ratings potential and market value.

In addressing the joint venture arguments of NCAA, the Commission in its amicus brief to the Supreme Court observed that "the very purpose of the NCAA's policy was to limit individual members' sales" and that NCAA's football television policy:

> artificially suppressed product diversity by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and deprived consumers (viewers) of their choice of games by limiting the number of television appearances by individual teams. The evidence showed that these restrictions reduced the

> opportunity for many smaller schools to appear on television (either locally or regionally) [citation omitted], and reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as consumer demand would dictate [citation omitted].

Amicus brief, pp. 17-18. These are precisely the anticompetitive effects which have been deliberately eliminated by the CFA's plan. The evidence will demonstrate this beyond question.

C. The Limited Exclusivity Provisions of the CFA Contracts are Efficiency Justified and Procompetitve.

In each of its television contracts, the CFA has agreed to grant the telecaster a degree of limited exclusivity as to the package of rights sold to that telecaster, both with respect to carrier and time period. These provisions have been driven by network and advertiser demand, although, over the years, the CFA has been successful in obtaining some relaxation of the time exclusivity provisions.

With respect to carrier exclusivity, the CFA's contracts with over-the-air networks have provided that neither the CFA nor its members will sell their home games to another of the national over-the-air networks. The 1991 ESPN contract provides that CFA will not *itself* sell another package of games to cable, but does not prohibit the CFA's participating members from doing so outside the CFA package.

With respect to time period exclusivity, the ABC contract partially protects a late afternoon time period by

requiring that other CFA games telecast on Saturdays when ABC is televising kick-off not later than 12:10 PM local time (which can be as late as 3:10 Eastern time for a game played on the West Coast) and that CFA cablecast games kick-off no earlier than 4:00 PM (New York Time) for the late afternoon series and no earlier than 7:00 PM (NYT) for the prime time series. The ESPN contract gives ESPN an exclusive right to CFA-member games starting between 7:30 and 8:00 PM (prime time) or between 4:00 and 4:30 PM (late afternoon), except for the ABC series.

CFA understands that telecasters and advertisers have valid efficiency justifications for seeking exclusivity provisions such as those contained in the CFA contracts. Exclusivity in the sale of television rights to a television broadcaster, cable programmer, or syndicator is an important component of the product itself. It is a characteristic not limited to college football; it appears in one form or another as part of virtually all television programming and other intellectual property rights.[6/]

[6/] The views of the same court which assayed the NCAA's plan *and* the CFA's plan are pertinent: "The court notes at the outset that the marketing of exclusive rights is not in itself offensive to the antitrust laws. Nor can it be disputed that marketing of exclusive rights to television programs is not in itself violative of the antitrust laws. Exclusive licenses in the television industry have commonly been found to advance competition by providing incentives to telecasters to invest in promotion and development of programs. Without exclusivity it is doubtful that many licensees could afford to develop programs fully." *Association of Independent Television Stations, Inc. v. College Football Association*, 637 F.Supp. 1289, 1304 (W.D.Okla. 1986).